3.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918

No. [redacted]417

D. G. McKINLEY AND J. L. BRAY, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

FILED APRIL 18, 1918.

(26,449)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 982.

D. G. McKINLEY AND J. L. BRAY, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 22, 1918.

1 *Indictment.*

The Grand Jurors of the United States, selected, chosen and sworn in and for the Western Division of the Southern District of Georgia, upon their oaths present:

That heretofore, to-wit, on the first day of December, in the year of our Lord one thousand nine hundred seventeen, one D. G. McKinley and one J. L. Bray, whose respective further given names are to the Grand Jurors aforesaid unknown, late of said Division and District, in the County of Bibb, within said Division and District and within the jurisdiction of this court, did then and there unlawfully, wilfully, and corruptly keep and set up a house of ill fame, brothel and bawdy house, within the distance as prohibited by the Secretary of War, as authorized by and under Section Thirteen of "An Act to Authorize the President to Increase Temporarily the Military Establishment of the United States," approved May 18th, 1917, to-wit, within five miles of a certain military station of the United States, to-wit, a Provost Guard of the Military Forces of the United States, stationed in what is known as the "Old Nisbet School," on Orange Street, in the City of Macon, Bibb County, Georgia, which house of ill fame, brothel and bawdy house is located on Mulberry Street, in the City of Macon, Bibb County, Georgia, and is known as Hotel McKinley, and is advertised by a sign in front of the main or street entrance thereof as Soldiers' Home; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the said United States.

F. O. MILLER.
Foreman of the Grand Jury.

E. M. DONALSON,
United States Attorney.

Filed March 8th, 1918. Cecil Morgan, Deputy Clerk.

Plea.

The defendants D. G. McKinley and J. L. Bray waives arraignment and pleads not guilty in open Court, this 12th day of March, 1918.

FEAGIN & HANCOCK,
Attys. for D. G. McKinley and J. L. Bray.

Filed March 12, 1918. Cecil Morgan, Deputy Clerk.

Verdict.

We, the jury, find the defendants Guilty this 15th day of March, 1918.

L. A. HEATH, *Foreman.*

Filed March 15, 1918. Cecil Morgan, Deputy Clerk.

2 *Sentences.*

The above named defendants having been found guilty by a jury on the fifteenth day of March, 1918.

It is Considered, Ordered, and Adjudged by the Court that the defendant J. L. Bray be imprisoned in the common jail of Bibb County for a period of two (2) months, beginning with date of his incarceration after conviction, and that he do pay a fine of one hundred dollars, ($100.00), to include costs of prosecution; and that said defendant, D. G. McKinley, be imprisoned in the common jail of Bibb County for a period of one year, beginning from the date of his incarceration after conviction, and that he do pay a fine of one thousand dollars ($1000.00) to include costs of prosecution; and that said defendants both remain in prison in said jail until said respective fines are paid, or until they are otherwise discharged by law.

In Open Court,
This 25th day of March, 1918.

EMORY SPEER,
United States Judge.

Filed March 25, 1918. Cecil Morgan, Deputy Clerk.

3 *Bill of Exceptions.*

Be It Remembered, That on the trial of this cause in this Court, at the October Term, 1917, of said Court, the Honorable Emory Speer, Judge, presiding, when the following proceedings were had to-wit:

The defendants D. G. McKinley and J. L. Bray were indicted in the District Court of the United States for the Southern District of Georgia for a violation of the Act of Congress approved May 18, 1917, Section 13, which indictment came on to be heard on the 12th day of March, 1918. The defendants filed their plea of not guilty. A jury was empanelled to try said case, and after all the evidence was in the jury rendered a verdict finding the defendants D. G. McKinley and J. L. Bray guilty, which verdict was rendered on the 15th day of March, 1918; that the judge withheld his sentence until the 25th day of March, 1918, at which time the Court sentenced D. G. McKinley to serve twelve months in the jail of Bibb County, Georgia, and in addition thereto to pay a fine of one thousand dollars. He sentenced the said J. L. Bray to serve two months in the jail of Bibb County, Georgia, and in addition thereto to pay a fine of one hundred dollars. After which judgment and sentence of the Court each of the defendants made a motion in arrest of judgment; which motion in arrest of judgment was made on the ground that the bill of indictment, all of the evidence, the verdict of the jury and the judgment of the Court was invalid, null and void, for that, neither of the defendants had violated any valid subsisting

law of the United States of America, for that the act on which the said defendants D. G. McKinley and J. L. Bray were convicted, being the Act approved May 18, 1917, was unconstitutional for that the United States Congress did not have the constitutional authority and power to pass said law. The motion was overruled by the Court, which ruling of the Court was excepted to and exceptions noted and allowed.

And, now, in furtherance of justice, and that right may be done the defendants, D. G. McKinley and J. L. Bray, tender and present this, the foregoing, as their bill of exceptions in said case to the action of the Court, and pray that the same may be settled and allowed, and signed and sealed by the Court, *and signed and sealed by the Court*, and made a part of the record, and this is accordingly done, this 27th day of March, 1918.

EMORY SPEER, *Judge*.

Filed March 27, 1918. Cecil Morgan, Deputy Clerk.

4 In the District Court of the United States for the Western Division of the Southern District of Georgia.

At Law.

D. G. McKINLEY and J. L. BRAY, Plaintiffs in Error.

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Petition for Writ of Error.

Now comes D. G. McKinley and J. L. Bray, petitioners herein and say:

That on the 25th day of March, 1918, the District Court entered a judgment herein in favor of the United States of America against these defendants in which judgment and the proceedings had prior thereto in this cause, certain errors were sommitted to the prejudice of these plaintiffs, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, these defendants pray that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a tra*b*script of the record, proceedings and papers on this cause, duly authenticated, may be sent to the Supreme Court of the United States.

FEAGIN & HANCOCK,
Attorneys for Plaintiff in Error.

R. DOUGLAS FEAGIN,
OLIVER C. HANCOCK,
Of Counsel.

Filed March 27, 1918. Cecil Morgan, Deputy Clerk.

5 In the District Court of the United States for the Western Division of the Southern District of Georgia.

At Law.

D. G. McKinley and J. L. Bray, Plaintiffs in Error,

vs.

United States of America, Defendant in Error.

Order Allowing Writ of Error.

This 27th day of March, 1918, come the defendants D. G. McKinley and J. L. Bray by their attorneys and files herein and presents to the Court their petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by them, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error upon the defendants giving bond according to law to be approved by the Court or its order in the sum of Four thousand ($4,000.00) Dollars as to D. G. McKinley and the sum of One thousand ($1,000.00) Dollars as to J. L. Bray, the same to be approved by the Court or its order, which shall operate as supersedeas bonds.

EMORY SPEER, *Judge*.

Filed March 27, 1918. Cecil Morgan, Deputy Clerk.

6 *Writ of Error.*

The United States of America, *ss:*

The President of the United States of America to the Judge of the District Court for the Western Division of the Southern District of Georgia, Greeting:

Because in the record and proceedings, and also the rendition of a judgment of a plea which is filed in said District Court, before you, between D. G. McKinley and J. L. Bray, Defendants, and the United States of America, *defendant*, a manifest error has happened, to the great damage of the said D. G. McKinley and J. L. Bray, as by his complaint appears. We, being willing that the error, if any has been, should be duly corrected, and fully and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United

States, together with this writ, so that you may have the same at the City of Washington on the 27th day of April, next, in said Supreme Court, to be then and there held, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 27th day of March, in the year of our Lord one thousand, nine hundred and eighteen, and of the independence of the United States of America the one hundred and forty second.

[SEAL.] LENOIR M. ERWIN,
Clerk of the District Court of the United States for the Southern District of Georgia.
By CECIL MORGAN,
Deputy Clerk.

Filed March 27, 1918. Cecil Morgan, Deputy Clerk.

7 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the City of Washington, on the 25th day of April, next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western Division of the Southern District of Georgia, wherein D. G. McKinley and J. L. Bray are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the City of Macon, in the district above named, this 27th day of March, in the year of our Lord one thousand nine hundred and eighteen.

EMORY SPEER,
Judge of the District Court of the United States for the Western Division of the Southern District of Georgia.

Due and legal service above citation acknowledged—Copy received and all other service waived.

WALLACE MILLER,
Asst. U. S. Atty.

March 27th, 1918.

Filed March 27, 1918. Cecil Morgan, Deputy Clerk.

8 *Assignment of Errors.*

The *plaintiff* in this action, in connection with this petition for writ of error, makes the following assignment or errors, which they avers *a*xist:

First. The Court erred, in overruling defendants' motion in arrest of judgment.

Wherefore, defendants pray that said judgment be reversed.

FEAGIN & HANCOCK,
Attorneys for Defendants.

R. DOUGLAS FEAGIN,
OLIVER C. HANCOCK,
Of Counsel.

9 *Pracipe on Appeal.*

In the District Court of the United States for the Western Division of the Southern District of Georgia.

The Clerk in making out the transcript for the writ of error to the Supreme Court of the United States in the above entitled cause will please include the following parts of the record:

1. The indictment with all the entries thereon, including the plea of the defendants of not guilty and the verdict of the jury.
2. The sentence and judgment of the Court based upon said verdict.
3. The bill of exceptions with all the entries thereon.
4. The petition for writ of error with all entries thereon.
5. The order allowing the writ of error.
6. The writ of error.
7. The citation with all entries thereon including the acknowledgement of service of the Government's attorneys.
8. The assignment of errors.
9. The præcipe for the record with all entries.
10. The cost bond filed by defendants.

R. DOUGLAS FEAGIN &
OLIVER C. HANCOCK,
Attorneys for Plaintiffs in Error,
D. G. McKinley and J. L. Bray.

P. O. Address, Macon, Ga.

Due and legal service of the foregoing præcipe is hereby acknowl*de*ged and copy received. All other service waived.
This March 28, 1918.

E. M. DONALSON,
U. S. Attorney.

Filed March 27, 1918. Cecil Morgan, Deputy Clerk.

10 *Cost Bond.*

Know All Men by These Presents, That we, D. G. McKinley and J. L. Bray, as principals, and J. R. McKinley, as *sureties*, are held

and firmly bound unto the United States of America, in the full and just sum of $250.00, ($250.00), to be paid to the said United States of America; to which payment well and truly to be made, we bind ourselves, our heirs, executirs and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 27th day of March, in the year of our Lord one thousand nine hundred and eighteen.

Whereas, lately at a district court of the United States in a suit pending in said Court, between the United States of America, plaintiff, and D. G. McKinley and J. L. Bray, defendants, a judgment was rendered against the said D. G. McKinley and J. L. Bray, and the said D. G. McKinley and J. L. Bray having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid matter, and a citation directed to the said United States of America, citing and admonishinh them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, on the 25th day of April, next.

Now, The condition of the above onligation is such, that if the said D. G. McKinley and the said J. L. Bray shall prosecute said writ of error to effect, and answer all damages and costs if *he* fail to make *his* plea good, then the above obligation to be void; else to remain in full force and virtue.

D. G. McKINLEY. [SEAL.]
J. L. BRAY. [SEAL.]
J. R. McKINLEY. [SEAL.]

Sealed and delivered in the presence of
L. M. ERWIN, *Clerk.*

Approved.

——— ———.

Filed March 27, 1918. Cecil Morgan, Deputy Clerk.

11 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of Georgia:

I, Lenoir M. Erwin, Clerk of the District Court of the United States for the Southern District of Georgia, do hereby certify that the foregoing pages of type writing contain a true copy of the record, bill of exceptions, assignment of error and all proceedings mentioned in the Præcipe, in the cause lately pending in said Court, numbered twenty two, on the Appeal Docket of said Court, entitled D. G. McKinley and J. L. Bray versus The United States of America, as the same now appears of record in my office.

To certify which, witness my hand and seal of said Court, at Macon, in said District, this 3rd day of April, A. D. 1918.

[Seal U. S. District Court, So. Dist. of Georgia, West'n Div.]

LENOIR M. ERWIN,
Clerk U. S. District Court,
Southern District of Ga.,
By CECIL MORGAN, *Deputy.*

12 THE UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the City of Washington, on the 25th day of April, next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western Division of the Southern District of Georgia, wherein D. G. McKinley and J. L. Bray are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the Judgment rendered against the said plaintiffs in error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Macon, in the district above named, this 27th day of March, in the year of our Lord one thousand nine hundred and eighteen.

EMORY SPEER,
Judge of the District Court of the United States for the Western Division of the Southern District of Georgia.

Due and legal service above citation acknowledged. Copy received and all other service waived.

WALLACE MILLER,
Asst. U. S. Atty.

Mar. 27th-18.
Entd. minutes. Book K, Folio 467.

13 [Endorsed:] U. S. District Court, Western Division, So. Dist. of Ga. #22. D. G. McKinley & J. L. Bray vs. The United States of America. Citation. Filed March 27, 1918, Cecil Morgan, Deputy Clerk.

Endorsed on cover: File No. 26449. S. Georgia D. C. U. S. Term No. 982. D. G. McKinley and J. L. Bray, plaintiffs in error, vs. The United States of America. Filed April 18th, 1918. File No. 26449.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

D. G. McKINLEY AND J. L. BRAY, plaintiffs in error,
v.
THE UNITED STATES OF AMERICA. } No. 417.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

The case involves the validity of the conviction of plaintiffs in error of the offense of unlawfully keeping and setting up a bawdy house within 5 miles of a certain military station in the United States, to wit, "a provost guard of the military forces of the United States," in the city of Macon, Ga., in violation of section 13 of the Selective Draft Act of May 18, 1917, 40 Stat. 76, 83. That section authorizes and directs the Secretary of War to do everything by him deemed to be necessary during the period of the war to suppress and prevent the keeping or setting up of bawdy houses within such distance as he may

deem needful of "any military camp, station, fort, post, cantonment, training, or mobilization place," and imposes a fine of not more than $1,000 or imprisonment for not more than 12 months, or both, for a violation of any order, rule, or regulation issued by the Secretary to carry out the object and purpose of the statute.

Acting pursuant to this authority the Secretary of War designated 5 miles from any of the military establishments enumerated as the distance within which it should be unlawful to conduct the places denounced by the statute.

Plaintiffs in error, who are at large on bail, challenged the constitutionality of the statute and have sued out a writ of error from this court.

Notice of this motion has been served upon opposing counsel.

ALEX. C. KING,
Solicitor General.

DECEMBER, 1918.

○

In the Supreme Court of the United States

OCTOBER TERM, 1918.

No. 417

D. G. McKINLEY AND J. L. BRAY,
Plaintiffs in Error,

Vs.

THE UNITED STATES OF AMERICA.

In Error to the District Court of the United States for the Southern District of Georgia.

BRIEF FOR PLAINTIFFS IN ERROR

R. DOUGLAS FEAGIN,
OLIVER C. HANCOCK,
Attorneys for Plaintiffs in Error.

P. O., Macon, Ga.

BURKE CO. MACON, GA

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1918.

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D. G. McKINLEY AND J. L. BRAY,
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Vs.

THE UNITED STATES OF AMERICA.

In Error to the District Court of the United States for the Southern District of Georgia.

BRIEF FOR PLAINTIFFS IN ERROR

STATEMENT OF THE CASE.

The defendants were convicted on an indictment charging them as follows: "That heretofore, to-wit, on the first day of December, in the year of our Lord one thousand nine hundred and seventeen, one D. G. McKinley and one J. L. Bray, whose respective further given names are to the Grand Jurors aforesaid unknown, late of said Division and District, in the County of Bibb, within said Division and District, and within the jurisdiction of this court, did then and there unlawfully, wilfully and corruptly keep and set up a house of ill

fame, brothel and bawdy house, within the distance as prohibited by the Secretary of War, as authorized by and under section thirteen of 'An Act to Authorize the President to Increase Temporarily the Military Establishment of the United States,' approved May 18th, 1917, to-wit, within five miles of a certain military station of the United States, to-wit, a Provost Guard of the Military Forces of the United States, stationed in what is known as the 'Old Nisbet School,' on Orange Street, in the City of Macon, Bibb County, Georgia, which house of ill fame, brothel and bawdy house is located on Mulberry Street, in the City of Macon, Bibb County, Georgia, and is known as Hotel McKinley, and is advertised by a sign in front of the main or street entrance thereof as Soldiers' Home; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States."

The defendants were convicted on March 12th, 1918.

The Act of Congress under which the indictment was drawn is the Act of May 18th, 1917, c. 15 par. 13, 40 Stat. 83, and is as follows:

"The Secretary of War is hereby authorized, empowered and directed during the present war to do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels or bawdy houses, within such distance as he may deem needful of any military camp, station, fort, post, cantonment, training or mobilization place and any person, corporation, partnership, or association receiving or permitting to be received for immoral purposes any person into any place, structure or building used for the purpose of lewdness, assignation, or prostitution within such distance of said places as may be designated, or shall permit any such person to remain for immoral purposes in any such place, structure, or building as aforesaid, or who shall violate any order, rule, or regulation issued to carry out

the object and purpose of this section, shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both."

The Court sentenced the defendants and after judgment and sentence was pronounced the defendants moved in arrest of the judgment, attacking the indictment, verdict and judgment as invalid, null and void, for that neither of the defendants had violated any valid subsisting law of the United States, for that the Act on which the defendants were convicted, being the Act above quoted, under which the defendants were indicted, was unconstitutional for that the United States Congress did not have the constitutional authority and power to pass said law.

The motion in arrest of judgment was overruled by the Court, which ruling of the Court was excepted to and exceptions noted and allowed, and the plaintiffs in error thereupon brought the case by writ of error to the Supreme Court of the United States.

SPECIFICATION OF THE ERRORS RELIED UPON

The error relied upon in this case is simply that the lower Court erred in overruling the motion in arrest of judgment of the defendants.

The point was made in the motion in arrest (see pages 2 and 3 of the Record) that the indictment, the verdict of the jury and the judgment of the Court were invalid, null and void, for that neither of the defendants had violated any valid subsisting law of the United States, for that the Act on which the defendants were convicted was unconstitutional for that the United States Congress did not have the constitutional authority and power to pass said law.

The Court below committed error in refusing to sustain this motion in arrest of judgment on the part of the defendants, timely made, and in overruling it.

BRIEF AND ARGUMENT

The single question involved in this case is that of the constitutionality of the Act of Congress under which the defendants were indicted and convicted. Has Congress the power under the Constitution to punish the offense charged in the indictment or is jurisdiction thereover solely with the State of Georgia?

As we interpret the decisions of the Supreme Court, the question is not an open one, but has been decided in favor of the contention of the plaintiffs in error, on principle, in the case of Keller vs. United States, 213 U. S., 138; 53 Law Ed., pages 737-742.

Speaking for the majority opinion of the Court in the Keller case, Mr. Justice Brewer said: "While the keeping of a house of ill fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the State. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the States, for there is in the Constitution no grant thereof to Congress."

In the same opinion Mr. Justice Brewer quotes the language of Mr. Justice Story in Houston vs. Moore, 5 Wheat. 1, 48, 5 Law Ed. 19, 30, as follows: "Nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the National Government beyond what the people have granted by the Constitution."

Nor can the fact that the Act under which the defendants were convicted was emergency legislation, passed during time of war, change or affect the question.

For, as Mr. Justice Davis declared in the opinion of the Supreme Court in *ex parte* Milligan, 4 Wallace, 2-142, 18 Law Ed., page 295:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

If these provisions cannot be suspended in time of war, neither can they be added to.

The broad powers of Congress to regulate commerce with foreign nations were not interpreted by the Supreme Court in the Keller case, supra, as giving Congress power to make criminal the mere keeping, maintaining, supporting, or harboring, for the purpose of prostitution, any alien woman woman within three years after she should have entered the United States. The power was expressly denied.

By analogy, and with equally strong reason to support it, the power of Congress "to raise and support armies (but no appropriation of money to that use shall be for a longer term than two years)" cannot be interpreted as giving Congress the power to invade the region of the police power of the States and make criminal, and punishable in the Federal Courts, the keeping of a bawdy house, an offense which is

made criminal and punishable by the laws of every State in the Union. We quote the law of Georgia on the subject, Park's Code of Georgia, Vol. 6, Section 382, as follows:

"382. Lewd House. If any person shall maintain and keep a lewd house, or place for the practice of fornication or adultery, either by himself or others, he shall be guilty of a misdemeanor."

The punishment. Park's Code of Georgia, Vol. 6, Section 1065, as follows:

"1065. Misdemeanors, how punished. Except where otherwise provided, every crime declared to be a misdemeanor is punishable by a fine not to exceed one thousand dollars, imprisonment not to exceed six months, to work in the chaingang on the public roads, or on such other public works as the county or State authorities may employ the chaingang, not to exceed twelve months, any one or more of these punishments in the discretion of the judge . . ."

For if the powers of Congress could be interpreted as extending to this offense, which affects the health, morals, peace and welfare of the entire community, as well as the soldiers who may be within five miles of the place of the commission of the offense, could not, by the same logic, the powers of Congress be extended to cover and include, in time of war, the right to prohibit and punish every offense which affects the peace, morals, health and welfare of the people, and thus destroy and eliminate for the duration of war the police power of the States?

To concede the power in this case is to admit the right of its extension to all other crimes and misdemeanors punishable under the police power of the States.

To give such a construction to the powers of Congress would extend its power to legislate about everything essential to the public safety, health and morals of the people.

It was never intended by the framers of the Constitution

of the United States that Congress should have any such power.

Cooley's Constitutional Limitations, 7th edition, page 831, declares: "In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual States, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress. Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the States. All that the Federal authority can do is to see that the States do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of rights guaranteed by the Federal Constitution."

For these reasons we respectfully submit that the motion in arrest of judgment should have been sustained by the Court below.

Respectfully submitted,

Attorneys for D. G. McKinley and J. L. Bray,
Plaintiffs in Error.

P. O., Macon, Ga.

Due and legal service acknowledged on foregoing brief for plaintiffs in error. Copy of same received. All other, further and better service waived.

This_____day of February, 1919.

_____

U. S. District Attorney, Southern District of Georgia,
Attorney for Defendant in Error.

INDEX.

AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

D. G. McKINLEY AND J. L. BRAY, plaintiffs in error, *v.* THE UNITED STATES OF AMERICA. } No. 417.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

The defendants were indicted for keeping and setting up a house of ill fame within the distance prohibited by the Secretary of War under the authority of section 13 of the Selective Service Act of May 18, 1917, 40 Stat. 76, 83 (R. 1). After a trial they were each convicted and sentenced (R. 1, 2). Thereupon they have presented to this court a bill of exceptions (R. 2, 3) in which it is stated that after the verdict and sentence the defendants made a motion in arrest of judgment on the ground that the bill of indictment and all the subsequent proceedings were null and void for the reason that the Act of May 18, 1917, *supra*, was unconstitutional, and that the motion in

arrest of judgment was overruled by the court, to which ruling the defendants excepted (R. 2, 3).

The only assignment of error is the action of the court in overruling the said motion in arrest of judgment (R. 6).

I.

The writ of error should be dismissed for lack of jurisdiction.

(*a*) The only error assigned is that the District Court erred in overruling defendants' motion in arrest of judgment, based on the ground that the statute under which the indictment was presented was unconstitutional so that all of the proceedings in the case were null and void (R. 2, 3). This alleged error of the District Court is brought to the attention of this Court solely by the medium of a bill of exceptions. This is a use of a bill of exceptions unwarranted by law. Such a bill can not bring up errors in the record proper. It *must* be confined to errors occurring at the trial as to which there can be no record. If this be not true, it follows that the entire course of a case from the filing of the complaint or the presentment of the indictment down to its submission to the Court of Error might be summarized for the benefit of that court in narrative form in a bill of exceptions, thus depriving the court of the right to examine the very record of the proceedings, *ipsissimis verbis*. A motion in arrest of judgment based upon the alleged unconstitutionality of a statute of the United States, and an order denying

such motion, can not be brought to the notice of this Court in any less formal manner than by a production of the actual record of the court upon the matter.

The only statute of the United States dealing with bills of exceptions—section 953, R. S., as amended—clearly contemplates in all its provisions that a bill of exceptions is confined to matters occurring at the trial, excluding even the motion for a new trial.

In *Walton* v. *United States*, 9 Wheat. 651, 657, 658, this Court said:

> *It is a settled principle that no bill of exceptions is valid, which is not for matter excepted to at the trial.* We do not mean to say that it is necessary, (and in point of practice we know it to be otherwise,) that the bill of exceptions should be formally drawn and signed, before the trial is at an end. It will be sufficient, if the exception be taken at the trial, and noted by the court, with the requisite certainty; and it may afterwards, during the term, according to the rules of the court, be reduced to form, and signed by the judge; and so, in fact, is the general practice. But in all such cases, the bill of exceptions is signed nunc pro tunc; and it purports on its face to be the same as if actually reduced to form, and signed, pending the trial. *And it would be a fatal error, if it were to appear otherwise; for the original authority, under which bills of exceptions are allowed, has always been considered to be restricted to matters of exception taken pending the trial, and ascertained before the verdict.* [Italics ours.]

The general nature and functions of a bill of exceptions are explained by this Court in *Ex parte Crane*, 5 Pet. 190, 199; *Barton* v. *Forsyth*, 20 How. 532, 533, 534; *Railway Company* v. *Heck*, 102 U. S. 120; and especially in *Nalle* v. *Oyster*, 230 U. S. 165, 176–179. In the latter case it is said (230 U. S. 177):

> And on the other hand, the function of an exception is not confined to rulings made upon the trial of the action.

The context shows clearly, however, that this Court did not refer to errors which could be made a matter of record, but to those which would be *in pais* if not preserved by a bill of exceptions.[1] The matter is also thoroughly considered by Judge Taft delivering the opinion of the Court of Appeals in *Johnson* v. *Garber*, 73 Fed. 523.

It is true that these decisions deal with the time when exceptions must be noted as to *matters occurring at the trial*, or with the necessity for a bill of exceptions where the alleged error appears of record, and not directly with the question whether, on error, the absence of the actual record of the court below can be supplied by a bill of exceptions; but all of them assume as beyond question that the very record of the lower court is the only source of information

[1] Lord Coke in 2d Inst., 427, clearly intimates that a bill of exceptions must be prayed before judgment. Blackstone, vol. 3, p. 372, confines it to matters occurring at the trial. In *Ford* v. *Potts*, 1 Halst. 388, referred to with approval in *Defiance Fruit Company* v. *Fox*, 76 N. J. Law, 482, 489, the bill was confined to "errors which could not properly be inserted in the record."

open to the Court of Error where it is available, and that the sole function of the bill of exceptions is to bring into the record matters which, from the necessity of the case, have not the accurate authentication of the record itself.

In the case of *Onondaga Insurance Company* v. *Minard*, 2 N. Y. 98, the English practice of taking a verdict subject to the opinion of the court *in banc* with leave to except was followed. The court *in banc* having decided that the plaintiff should be nonsuited, it excepted to this decision, and sought to raise the question by a bill of exceptions. After referring to the Statute of Westminster 2, and the New York statute reenacting it, the court said (2 N. Y. 100):

> These statutes confined the taking of the bill to the trial, and such was the universal practice under them.

Accordingly it was held that there was nothing before the court on which it could act.

(*b*) The point is not merely technical, although orderly procedure in courts of justice is of more importance to the proper exercise of the judicial power than might at first sight be supposed. In the case at bar, however, there is an attempt to raise a most important constitutional question without giving either the Department of Justice or this Court the benefit of an inspection of the exact record upon the subject.

The writ of error should, therefore, be dismissed for lack of jurisdiction.

II.

Congress had power under the Constitution to enact section 13 of the act of May 18, 1917.

(*a*) The power of Congress to enact this statute *as a whole*, under the constitutional power to raise and support armies, and to make rules for their government and regulation, is settled by the decision of this Court in *Arver* v. *United States*, 245 U. S. 366.

(*b*) The general power of Congress under this constitutional grant to protect the health of its soldiers, spiritual, mental, and physical, would have been supposed to be too clear for argument, had it not been for the brief submitted by the plaintiffs in error. This brief challenges the right of Congress to prohibit the keeping or setting up of bawdy houses within a designated distance from places where the military forces of the United States are situated. Such a claim is absolutely frivolous. Of all the evils tending to destroy the efficiency of an army, and therefore legitimately connected with and included under the power to make rules and regulations for its government and support, this is certainly as important as any. No attack can warrantably be made upon the statute on this ground.

The plaintiffs in error rely upon the case of *Keller* v. *United States*, 213 U. S. 138. It has absolutely no application. There it was held that the particular exercise of power by Congress in the statutory provision under consideration was outside of and beyond the power to regulate interstate and foreign com-

merce. The decision would be applicable to the case at bar if the protection of persons in the military service from the evils denounced by section 13 of Selective Service Act had no connection with the power of Congress to raise and support armies. As, however, the connection is most intimate, the Keller case has no bearing upon the case at bar. It may be said in regard to the citation of this case by the plaintiffs in error what was said in regard to a like citation in *Brolan* v. *United States*, 236 U. S. 216, 222:

> In fact it is true to say of the citation of these cases as well as of the reference to the *Keller Case* that a proposition which is so wholly devoid of merit as to be frivolous is not given a substantial character by an attempt to support it by contentions which are themselves wholly devoid of merit and frivolous.

See also *United States* v. *Bitty*, 208 U. S. 393; *Lottery Case*, 188 U. S. 321, 356; *Hippolite Egg Company* v. *United States*, 220 U. S. 45, 58; *Hoke* v. *United States*, 227 U. S. 308, 320–323.

If, therefore, the claim of the plaintiffs in error has no other basis than that stated in the brief filed on their behalf, the petition in error should be dismissed for the reason that the constitutional question alleged to be involved is so well settled as to be frivolous. It should be noted that neither the assignments of error nor the so-called bill of exceptions state any ground upon which it is asserted that the

Act is unconstitutional or Congress without authority to enact it. The only point made in the brief is that the Act of Congress is unconstitutional because invading the state's exclusive field and one covered by the state statutes. No point is made on the right of the Secretary to make regulations, and the authority, if challenged, is clearly sustained by the decisions of this Court. *In re Kollock*, 165 U. S. 526; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Buttfield* v. *United States*, 192 U. S. 499; *Union Bridge Company* v. *United States*, 204 U. S. 364; and *United States* v. *Grimaud*, 220 U. S. 506.[1]

CONCLUSION.

The writ of error should be dismissed for lack of jurisdiction or the judgment of the court below should be affirmed.

CLAUDE R. PORTER,
Assistant Attorney General.
W. C. HERRON,
Attorney.

FEBRUARY, 1919.

[1] See also *United States* v. *Peins Company*, 235 Fed. 961; *Estes* v. *United States*, 277 Fed. 818; *United States* v. *Romard*, 89 Fed. 156; *United States* v. *Ormsbee*, 74 Fed. 207; *Broadbine* v. *Revere*, 182 Mass. 598; *Polinsky* v. *People*, 73 N. Y. 65; *State* v. *Normand*, 76 N. H. 541.

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McKINLEY ET AL. *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 417. Submitted March 3, 1919.—Decided April 14, 1919.

Congress, under the authority to raise and support armies, may make rules and regulations to protect the health and welfare of the men composing them against the evils of prostitution, and may leave the details of such regulations to the Secretary of War.

Conviction sustained, for setting up a house of ill fame within five miles of a military station, the distance designated by the Secretary of War, under the Act of May 18, 1917, c. 15, § 13, 40 Stat. 76.

Affirmed.

THE case is stated in the opinion.

Mr. R. Douglas Feagin for plaintiffs in error. *Mr. Oliver C. Hancock* was on the brief.

Mr. Assistant Attorney General Porter and *Mr. W. C. Herron* for the United States.

Memorandum opinion by direction of the court, by MR. JUSTICE DAY.

Plaintiffs in error were indicted, convicted, and sentenced upon an indictment in the District Court of the United States for the Southern District of Georgia for violation of a regulation of the Secretary of War made under the authority of the Act of Congress of May 18, 1917, c. 15, § 13, 40 Stat. 76, 83. This statute provides:

"The Secretary of War is hereby authorized, empowered, and directed during the present war to do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels, or bawdy houses within such distance as he may deem needful of any military camp, station, fort, post, cantonment, training, or mobilization place, and any person, corporation, partnership, or association receiving or permitting to be received for immoral purposes any person into any place, structure, or building used for the purpose of lewdness, assignation, or prostitution within such distance of said places as may be designated, or shall permit any such person to remain for immoral purposes in any such place, structure, or building as aforesaid, or who shall violate any order, rule, or regulation issued to carry out the object and purpose of this section shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000, or imprisonment for not more than twelve months, or both."

Plaintiffs in error contend that Congress has no constitutional authority to pass this act. The indictment charged that the plaintiffs in error did unlawfully keep and set up a house of ill fame within the distance designated by the Secretary of War, under the authority of the act of Congress, to-wit, within five miles of a certain military station of the United States.

That Congress has the authority to raise and support armies and to make rules and regulations for the protection of the health and welfare of those composing them, is too well settled to require more than the statement of the proposition. *Selective Draft Law Cases*, 245 U. S. 366.

Congress having adopted restrictions designed to guard and promote the health and efficiency of the men composing the army, in a matter so obvious as that embodied in the statute under consideration, may leave details to the regulation of the head of an executive department, and punish those who violate the restrictions. This is also well settled by the repeated decisions of this court. *Buttfield* v. *Stranahan*, 192 U. S. 470; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *United States* v. *Grimaud*, 220 U. S. 506.

The judgment of the District Court is

Affirmed.